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Utah Court of Appeals

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Clark Sessions; Campbell, Mack & Sessions; Attorney for Respondent.
J. Douglas Kinateder; Attorney for Appellant.

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IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

SURETY LIFE INSURANCE CO., Plaintiff/Respondent, vs. MELVIN K. BURNINGHAM, HOWARD H. HUCKS, MARKWEST CORPORATION, a California corporation, and JOHN DOES I-X, Defendants/Appellants.	Case No. 89-0594-CA Case Priority 16

BRIEF OF APPELLANT

APPEAL FROM THE SUMMARY JUDGMENT AGAINST
APPELLANT MELVIN K. BURNINGHAM
IN AND FOR THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
CIVIL NO. 890255
THE HONORABLE RAYMOND S. UNO, PRESIDING

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OCT 2 1991

Mary T Noonan
Clerk of the Court

IN THE COURT OF APPEALS

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BRIEF OF APPELLANT

I.

JURISDICTION OF THE COURT

The Utah Court of Appeals has jurisdiction pursuant to Rule 3 of the Rules of the Court of Appeals of the State of Utah.

II.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented on appeal:

A. Did the U.S. Bankruptcy petition of the entity Draper R.V. & Commercial Storage operate as a stay against the action of plaintiff particularly if

defendants relied on the stay in bankruptcy while plaintiff's motion for stay was pending?

B. Did the trial court abuse its discretion in denying defendants' motion to file a counterclaim, their motions to set aside the summary judgment and the motions to set aside the defaults of Howard H. Hucks and Markwest Corporation?

C. Were there material controverted facts before the court necessitating trial on the merits and making summary judgment improper?

The standard for review is set forth in Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d 297 (1953) to the effect that the party against whom summary judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in light most favorable to him. Because disposition of a case on summary judgment denies the benefit of a trial on the merits, the appellate court must review the evidence in the light most favorable to the losing party, and affirms only where it appears there is no genuine dispute as to any material issues of fact. Themy v. Seagull Enters, Inc., 595 P.2d 526 (Utah, 1979).

III.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The following statutes and cases are applicable:

ADDENDUM A: Utah Code Annotated, Sec. 57-1-32, and Utah Code Annonted, Sec. 57-1-33.

ADDENDUM B: Utah Rules of Civil Procedure, Rule 55 (a) (2); and Utah Rules of Civil Procedure, Rule 56(f);

ADDENDUM C: Utah Rules of Civil Procedure, Rule 58 A (d);

ADDENDUM D: Utah Rules of Civil Procedure, Rule 60 (b);

ADDENDUM E: U.S. Bankruptcy Law, 11 USCS Sec. 362 (a) (1);

ADDENDUM F: U.S. Bankruptcy Law, 11 USCS Sec. 362 (c);

ADDENDUM G: U.S. Bankruptcy Law, 11 USCS Sec. 1301 (a);

ADDENDUM H: Rule 3 of the Rules of the Court of Appeals.

IV.

STATEMENT OF CASE

Defendants entered into an agreement among themselves to construct and operate a recreational vehicle storage center in Draper, Utah. Originally defendant MELVIN K. BURNINGHAM intended to construct the project with his son, Wayne Burningham, but after

contacts with an initial lender, they were informed they needed to bring in additional contract experience. The defendants agreed among themselves that the general contractor would be MARKWEST CORPORATION (a company operated by defendant HOWARD HUCKS), with Wayne Burningham as the supervisor. On January 9, 1987, defendants executed a promissory note in the sum of one million dollars ($1,000,000.00), payable to SURETY LIFE INSURANCE COMPANY, the long-term contractor. A copy of the note is attached as Exhibit "A" to the Complaint. (R. 007.) Defendant MELVIN K. BURNINGHAM signed the note individually. Defendants HOWARD H. HUCKS, MELVIN K. BURNINGHAM, and a non-defendant Wayne Burningham signed as guarantors to the note on the same date. (R. 101.) In addition, defendants executed a trust deed to the plaintiff which is referred to in the Complaint. Defendants allege that the plaintiff SURETY LIFE INSURANCE COMPANY, as the long-term lender, was a partner with United Savings, the construction lender, and that, because of interference by the loan supervisors, cost overruns and delays were incurred. In addition, defendants claim that, because of the refusal of the long-term lender and construction lender to release funds for the project, including the release of monies for

advertising, the result was the folding of the project and the defendants' default under the loan. On the 15th day of September, 1987, counsel for the plaintiff recorded a Notice of Default and Election to Sell. On July 27, 1988, the plaintiff conducted a Trustee Sale at public auction for seven hundred thousand dollars ($700,000.00) for the property and buildings constructed, known as Draper RV & Commercial Center. A few days prior to the Trustee Sale, non-defendant Wayne Burningham caused a Petition to be filed in Bankruptcy for Draper RV & Commercial Center. Notice was given to the trustee, Mr. Clark W. Sessions, who is also counsel for the plaintiff. Because the Bankruptcy Petition did not name any of the defendants The trustee refused to postpone the Trustee Sale. In the Trustee Deed, dated July 29, 1988, the trustee referred to an action of MELVIN KEITH BURNINGHAM in another suit wherein BURNINGHAM referred to his business as Draper R.V. & Commercial Storage. (R. 40.) On September 14, 1988, a Complaint was filed naming MELVIN K. BURNINGHAM, MARKWEST CORPORATION as designated defendants with JOHN DOES I through X. Defendant MELVIN K. BURNINGHAM filed an Answer to the Complaint on October 18, 1988, signed by his counsel

J. Douglas Kinateder. The answer referred to the pending U.S. Bankruptcy Action (R. 48). Among the other defenses submitted in the answer was the failure of the plaintiff to sell the property for market value. On October 26, 1988, defendant MELVIN K. BURNINGHAM filed a Motion To Set Aside or Vacate Trustee Sale of Real Property in the same action. (R. 105.) The Motion to Set Aside referred to the Bankruptcy case in the name of Draper RV & Commercial Storage in Case No. 88-4245 of the Bankruptcy Court for the Central District of Utah.

On October 21, 1988, plaintiff filed a Motion to Amend Complaint to add causes of action pertaining to the individual guarantors of the promissory note and trust deed. On November 7, 1988, defendant filed objections to the Motion to Amend the Complaint, referring again to the automatic stay in the U.S. Bankruptcy Court. The court did not grant leave to file the amended complaint; however, until January 3, 1989. (R. 141.) In the meantime, plaintiff served HOWARD H. HUCKS, individually and as president of MARKWEST CORPORATION, with the original Complaint which did not mention the liability of the guarantors, on October 20, 1988. (R.109-112.) On October 27, 1988,

HOWARD HUCKS was served with a copy of the Amended Complaint. (R. 115.)

On November 7, 1988, plaintiff filed a Motion for Relief From Stay in the U.S. Bankruptcy Court and mailed a copy of the motion to HOWARD HUCKS in Santa Barbara, California. (R. 304.) On January 9, 1989, just six (6) days after the court signed permission for plaintiff to file the Amended Complaint, a default judgment was taken against HOWARD H. HUCKS and MARKWEST CORPORATION in the sum of $555,668.37 for failure of MARKWEST or HOWARD H. HUCKS to respond to the Amended Complaint. A certificate of mailing of the default judgement with a blank date of December, 1988 was unsigned. The unsigned certificate was addressed to J. Douglas Kinateder, attorney for MELVIN K. BURNINGHAM, but no reference was made to a certificate of mailing to HOWARD HUCKS or MARKWEST CORPORATION. (R. 145,146.) The amount of the default judgment was $557,653.30. Though counsel did not receive a copy of the judgment, he did receive a copy of the default certificate and filed, on January 20, 1989, a Motion to Set Aside the Default of Defendant MARKWEST CORPORATION, (R. 147-149) with accompanying Affidavit in Support of Motion to Set Aside the Default Judgment Against MARKWEST CORPORA-

TION. (R. 151.) The motion was never responded to.

On March 8, 1989, plaintiff filed its Motion for Summary Judgment with no supporting affidavits, but with a Memorandum which quoted portions of the deposition transcript taken of MELVIN K. BURNINGHAM. On March 20, 1989, defendants filed Objection to Motion for Summary Judgment and requested oral argument. An extension was requested to March 30, 1989 to submit affidavits and Memorandum in Opposition. On March 30, 1989, Wayne Burningham, son of defendant MELVIN K. BURNINGHAM, filed an Affidavit in Opposition to Motion for Summary Judgment stating, among other things, that he had been the manager of Draper RV & Commercial Storage since the founding of the company in January, 1986, and had been the principal agent of MELVIN K. BURNINGHAM, that he was a licensed real estate broker, and was familiar with the values of the storage project and it was his opinion that the project as storage condo units had the value of one million seven hundred fifty thousand dollars ($1,750,000.00). On April 5, 1989, plaintiff moved to strike Wayne Burningham's affidavit, or in the alternative, submitted the decision for ruling. (R. 216.) On April 7, 1989, a Motion to Set Aside the Default of defendant HOWARD H.

HUCKS was filed. (R. 221.) The motion was supported by an affidavit of J. Douglas Kinateder, attorney for defendants, and dated April 10, 1989. (R. 227.) An unsigned affidavit of HOWARD HUCKS also was filed in support. (R. 225.) HOWARD HUCKS was not able to sign because the affidavit did not reach him in California in time. On April 8, 1989, HOWARD HUCKS signed his affidavit in support of the motion to set aside.

Two very confusing events then quickly followed. On April 18, 1989, the Honorable Raymond S. Uno granted (according to Minute Entry) summary judgment pursuant to Rule 4-501 in favor of the plaintiff. The Minute Entry is recorded as 246 of the record; however, it bears no filing stamp. On April 26, 1988, Judge Uno issued a Minute Entry entitled, "Court Ordered Notice," and stated that the court on its own motion ordered that oral argument is granted on plaintiff's motion. (R. 247.) The matter was set for hearing for April 27, 1989, at 9:00 AM. Since the plaintiff never filed a motion for oral argument, this had to be in error as the defendant was the one who requested the hearing on oral argument. (R. 176-177.) On April 27, 1989, at 9:00 AM, defendants' counsel appeared for hearing and was informed by the clerk that

summary judgment had already been granted. Upon further inquiry and persistence, counsel for the plaintiff appeared and in a conference with the court, the court informed the parties that he would not sign a summary judgment until the matter could be continued for further hearing. However, the court thereafter behaved as if the summary judgment had been granted and plaintiff and defendants had to labor under the premise that they could only set aside the judgment pursuant to Rule 60 B.

At the conference on April 27, 1989, the court also stated that the defendants should tender their counterclaim by filing, though the court refused to rule on whether the counterclaim would be permitted. The counterclaim was tendered by filing (R. 248-258.), and the matter was treated as if the defendants had made an oral motion to file the counterclaim. Plaintiff filed objection to defendants' motion to file answer and counterclaim (R. 265-267.) and plaintiff replied to the counterclaim. (R. 277 - 285.) Thereafter, supporting affidavits to defendants' position were filed, among which was one of Howard Hucks wherein he testified that he believed a Stay of the U.S. Bankruptcy Court was in effect as he received

a copy of the Motion for Relief From Stay but never received a copy of the Order relieving the stay. (R. 291 -304.) The motion to vacate or set aside the summary judgment was also filed as defendants were unaware, or at least uncertain, whether the court was considering arguments to set aside its summary judgment or whether the court had, in fact, not ruled on the summary judgment issues. (R. 305 - 312.) Thereafter, supporting memoranda were filed which are part of the record. An affidavit of this counsel (R. 291 - 294.) states that in a thorough search of the bankruptcy records at U.S. District Court, the order of relief from stay on plaintiff's petition had never been signed as of May 15, 1989. Plaintiff was granted relief from stay after trial in December of 1988. A copy of the Order of Relief from Stay has never been made a part of the record in the above appeal.

The summary judgment order of the Honorable Raymond S. Uno has never been signed. (R. 260-262.)

After oral argument on or about June 2, 1989, on all pending motions the court signed an order on June 12, 1989, (R. 341 - 343.) wherein the court denied the motion of HOWARD HUCKS to set aside the default judgment against him, denied the motion of

MELVIN K. BURNINGHAM to vacate or set aside the summary judgment. It is from that order that this appeal is taken.

V.

RELEVANT FACTS WITH CITATION TO THE RECORD

The relevant facts and citations to the record have been stated in the preceding STATEMENT OF THE CASE.

VI.

SUMMARY OF ARGUMENT

Defendant BURNINGHAM argues that where the defendants operated under the name of Draper RV & Commercial Storage, the filing of the bankruptcy of that entity should be treated as a stay in the proceedings until the Court signed its order lifting the stay. The order was not signed until June 4, 1989, after the trial court made its final rulings granting summary judgment and denying all motions of the defendants. Defendant BURNINGHAM also argues that the Court abused its discretion in not setting aside the default of defendants Howard Hucks and Markwest Corporation and in not allowing the filing of a counterclaim of defendants. Said counterclaim alleged damages caused by the

failure of plaintiff and its lending partner to timely release funds for the completion of the storage units and advertising.

Defendant BURNINGHAM argues further that there were controverted and triable issues of fact making the granting of summary judgment improper; namely, whether defendant BURNINGHAM was incompetent to sign the guarantee after a stroke and the market value of the property at the time of the Trustee's sale from which the deficiency must be determined.

VII.

ARGUMENT

POINT I: THE FILING OF THE BANKRUPTCY PETITION OF DRAPER R.V. & COMMERCIAL STORAGE STAYED THE SUIT OF PLAINTIFF IN DISTRICT COURT, OR AT LEAST JUSTIFIED THE RELIEF REQUESTED OF DEFENDANTS BEFORE DISTRICT COURT WHERE THEY RELIED ON THE STAY AND PLAINTIFF'S ACTIONS.

Under the United States bankruptcy law actions in state courts are stayed against the debtor. 11 U.S.C.S. #362 (a)(1 -4), and #1301 (a) (See addendum). The stay exists until the case is closed or dismissed. 11 USCS #362 (c)(2)(A)(B) addendum.

Plaintiff was aware of the name of the project for which the funds were expended and had experienced litigation over the project in another suit

with the Burninghams and Draper R.V. & Commercial Storage in which restraining orders on earlier proposed trustee sales by the plaintiff were sought. Draper R.V. was not a corporation but a partnership of the defendants, which was known by the plaintiff.

Even if defendants were not named individually on the bankruptcy petition filed a few days before the trustee's sale, the defendants were co-debtors with Draper R.V. & Commercial storage. 11 USCS #1301 (a)(1)(2) (Addendum). The only exceptions are when the debtors incurred the debt in the ordinary course of their business or the case has been dismissed. In any event the remedy of plaintiff would be to see a relief from stay. This plaintiff sought to do and sent a copy of the motion for relief from stay to Howard Hucks. (R. 304). Plaintiff obtained an oral ruling of relief from stay in mid December 1988, but had continued in the meantime to serve summons and complaints and amended complaints on the defendants. No order of relief from stay was ever signed by the U.S. Bankruptcy Court as of May 15, 1989.

Howard Hucks stated under oath in his affidavit that he relied on plaintiff's motion for relief from stay in delaying to answer the Utah civil

suit. (R. 298,299).

While plaintiff chose to mail Hucks a copy of the Motion for Relief From Stay they did not choose to mail him a copy of the default nor the default judgment nor their motion to amend the complaint nor the Order on the Motion permitting the amendment of the complaint. In the event the court should not determine that the defendants were codebtors with Draper R.V. & Commercial Storage, and therefore beneficiaries of the automatic stay under 11 USCS #1301 (a), defendant submits that the reliance on the stay at least justifies a finding of excusable neglect under Rule 60 (b) of the Utah Rules of Civil Procedure and the Order of the Honorable Raymond S. Uno should be reversed and the case remanded for trial.

POINT II: THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING SUMMARY JUDGMENT AND IN REFUSING TO ALLOW DEFENDANTS TO FILE ANSWERS AND A COUNTERCLAIM AND IN REFUSING TO SET ASIDE THE SUMMARY JUDGMENT.

In review of a summary judgment, the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to that party. Morris v. Farnsworth Motel,

123 Utah 289, 259 P.2d 297 (1953).

The court, recognizing that the party adversely affected by the summary judgment has not had an opportunity for trial, therefore views the facts in the light most favorable to that party. Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 793 P.2d 415 (Utah Ct. App. 1990).

In Christensen v. Financial Serv. Co., 14 Utah 2d 101, 377 P.2d 1010 (1963), the court stated a party opposing a motion for summary judgment is not required to file opposing affidavits, but may stand upon his pleadings provided that his allegations, if proved, would establish a basis for recovery.

The court ruled in Williams v. Barber, 765 P.2d 887 (Utah, 1988) that a defendant's failure to oppose plaintiff's motion for partial summary judgment was a capitulation only on the question of whether there was a genuine issue of material fact with respect to his breach of duty, and granting judgment did not relieve plaintiff of the obligation to prove any damages he sustained that were proximately caused by defendant's negligence.

On a motion for summary judgment against a

party, the court ruled that where some of the facts are in dispute, a judgment can properly be rendered against him only if, on the undisputed facts, that party has no valid defense. Disabled Am. Veterans v. Hendrixson, 9 Utah 2d 152, 340 P.2d 416 (1959) (emphasis added)

In Bill Brown Realty, Inc. v. Abbott, 562 P. 2d 238 (Utah, 1977), the court ruled that the presence of a dispute as to materials facts disallows the granting of a summary judgment.

The court stated that summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. Hill ex rel Fogel v. Grand Cent., Inc., 25 Utah 2d 121, 477 P.2d 150 (1970)

In order for a nonmoving party to oppose successfully a motion for summary judgment and send the issue to a fact-finder, it is only necessary for the party to prove its legal theory and to show facts controverting the facts as stated in the moving party's affidavit. It is not necessary for the nonmoving party to prove its legal theory. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah Ct.App. 1988)

The courts are, and should be, reluctant to

invoke a remedy of summary judgment because such a ruling prevents litigants from fully presenting their case to the court. Brandt v. Springville Banking Co., 10 Utah 2d 350, 353 P.2d 460 (1960)

The record must be carefully scrutinized to see if the party presents allegations which, if true, would entitled him to judgment because the party against whom a summary judgment is entered is deprived of the privilege of trial. Rich v. McGovern, 551 P.2d 1266 (Utah 1976)

If there is any genuine issue as to any material fact, the motion for summary judgment should be denied. Young v. Felornia, 121 Utah 646, 244 P.2d 862, cert. denied, 344 U.S. 886, 73 S. Ct. 186, 97 L. Ed. 685 (1952); Ruffinengo v. Miller, 579 P.2d 342 (Utah, 1978)

A summary judgment is erroneous unless there is a showing that the disfavored party cannot produce evidence that would reasonably support a finding in its favor on a material or determinative issue of fact. Bridge v. Backman, 10 Utah 2d 366, 353 P.2d 909 (1960)

A summary judgment was ruled improper where affidavit in support of motion for summary judgment and supporting documents showed unsupported conclusions and

unresolved issues of fact, even though the nonmoving party did not present affidavits in opposition to motion for summary judgment. Frisbee v. K & K Const. Co., 676 P.2d 387 (Utah, 1984)

The court ruled that a summary judgment dismissing an action to collect a promissory note was improper because of the incompetency of the maker where evidence that a guardian had been appointed for the nonmoving party under the Uniform Veterans' Guardianship Act raised substantial fact issue. Home Town Fin. Corp. v. Frank, 13 Utah 2d 26, 368 P.2d 72 (1962)

The purpose of Sec. 57-1-33, Utah Code Annotated, is to protect the debtor, who in a nonjudicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a large deficiency. First Security Bank v. Felger, 658 F.Supp. 175 ID. Utah 1987) cited in Christenson v. Jewkes, 761 P.2d 1375 (Utah, 1988)

POINT III: THERE ARE CONTROVERTED FACTS AND ISSUES JUSTIFYING TRIAL ON THE MERITS AS RAISED IN THE PLEADINGS BEFORE THE DISTRICT COURT.

Counsel for defendant Burningham signed the answer for his client and the amended answer. (R.

48, 49, 140-141). In the amended answer is raised the issue of capacity (R. 140) for health reasons. Counsel realizes that there is nothing in the record to explain defendant Melvin Burningham's health. Counsel did not have time for reasons explained in his affidavit to do more than controvert the issue of damages. (See affidavit of J. Douglas Kinateder R. 291-294). Defendant, through his counsel, submits however, that there is evidence if not absolute proof, that defendant was confused at his deposition, portions of which has been offered by plaintiff. Defendant Melvin Burningham believed that the guarantee agreement and the note were the same (R.157). He also cited "Error in Memory" or "Could not remember" at the time as reasons for his corrections to his deposition (R. 180).

Should the court have permitted the filing of the counterclaim issues of plaintiff's own contributions to the losses on the project would be examined under counts of fraud, breach of contract, and breach of fiduciary duty. (Counterclaim proffered R. 248-258.)

The main issue to be tried is that of the market value at the time of the trustee's sale. This sale took place under rush arrangements to avoid, where

possible, the automatic stay. Both answers of defendant Burningham and the affidavits of Howard Hucks and Wayne Burningham state their opinion as to the market value of the property being around a million dollars higher than the price at the trustee's sale. It is clear under 57-1-32 Utah Code Ann. (Addendum) the debtor has a right to trial on the issue of market value. In First Sec. Bank v. Felger 658 F. Supp. 175 (D. Utah 1987), the federal court interpreting Utah Law held the purpose of the statute was to protect the debtor from a creditor who could sell the property for a low price and then hold the debtor liable for a large deficiency.

VIII.

CONCLUSION

Because of the parties involvement in the U.S. Bankruptcy Court during critical stages of the proceedings in the above court, the lack of notices to some of the defendants, even though notices may not have been legally required, the affidavits of defendant which were submitted, the actions of the District Court in granting summary judgment and then scheduling arguments on summary judgment and the confusing status

of the existence of the case thereafter, and most importantly, for the controverted issues and facts relating to damages, the case should be remanded for trial and the Order of the Third Judicial District Court overturned. The damages involved are substantial and the parties should be entitled to a trial on the merits.

RESPECTFULLY SUBMITTED this 2nd day of October, 1991.

J. DOUGLAS KINATEDER
Attorney for Appellant

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

SURETY LIFE INSURANCE CO.,	
Plaintiff/Respondent,	
vs.	
MELVIN K. BURNINGHAM, HOWARD H. HUCKS, MARKWEST CORPORATION, a California corporation, and JOHN DOES I-X,	Case No. 89-0594-CA Case Priority 16
Defendants/Appellants.	

PROOF OF FILING

I, J. DOUGLAS KINATEDER, Attorney for Defendant/Appellant Melvin K. Burningham, hereby certify that on the 2nd day of October, 1991, the original and seven copies of the foregoing Brief of Appellant was filed with the Clerk of the Court of Appeals, at 230 South 500 East, Suite 400, Salt Lake City, Utah 84102.

DATED this 2nd day of October, 1991.

J. DOUGLAS KINATEDER
Attorney for Appellant
MELVIN K. BURNINGHAM

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

SURETY LIFE INSURANCE CO., Plaintiff/Respondent, vs. MELVIN K. BURNINGHAM, HOWARD H. HUCKS, MARKWEST CORPORATION, a California corporation, and JOHN DOES I-X, Defendants/Appellants.	Case No. 89-0594-CA Case Priority 16

PROOF OF SERVICE

I, J. DOUGLAS KINATEDER, Attorney for Defendant/Appellant Melvin K. Burningham, hereby certify that on the 2nd day of October, 1991, I served four (4) copies of the foregoing Brief of Appellant to Clark W. Sessions, Attorney for Respondent, by hand-delivering same to his offices at the following address:

CAMPBELL, MAACK & SESSIONS
170 South Main, Suite 400
Salt Lake City, UT 84101

DATED this 2nd day of October, 1991.

J. DOUGLAS KINATEDER
Attorney for Appellant
MELVIN K. BURNINGHAM

A D D E N D U M

ADDENDUM A: Utah Code Annotated, Sec. 57-1-32, and
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ADDENDUM F: U.S. Bankruptcy Law, 11 USCS Sec. 362 (c);

ADDENDUM G: U.S. Bankruptcy Law, 11 USCS Sec. 1301 (a);

ADDENDUM H: Rule 3 of the Rules of the Court of Appeals.

57-1-30. Sale of trust property by trustee — Corporate stock evidencing water rights given to secure trust deed.

Shares of corporate stock evidencing water rights used, intended to be used, or suitable for use on the trust property and which are hypothecated to secure an obligation secured by a trust deed may be sold with the trust property, or any part thereof, at the trustee's sale in the manner provided in this act.

1961

57-1-31. Trust deeds — Default in performance of obligations secured — Reinstatement — Cancellation of recorded notice of default.

(1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of such obligation or of such trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(2) If the default is cured and the trust deed reinstated in the manner provided in Subsection (1), the beneficiary, or his assignee, shall, on demand of any person having an interest in the trust property, execute and deliver to him a request to the trustee to execute, acknowledge, and deliver a cancellation of the recorded notice of default under such trust deed; and any beneficiary under a trust deed, or his assignee, who, for a period of 30 days after such demand, refuses to request the trustee to execute and deliver such cancellation is liable to the person entitled to such request for all damages resulting from such refusal. A release and reconveyance given by the trustee or beneficiary, or both, or the execution of a trustee's deed constitutes a cancellation of a notice of default. Otherwise, a cancellation of a recorded notice of default under a trust deed is, when acknowledged, entitled to be recorded and is sufficient if made and executed by the trustee in substantially the following form:

Cancellation of Notice of Default

The undersigned hereby cancels the notice of default filed for record ____, 19____, and record in Book ____, Page ____, Records of ____ County, (or filed of record ____, 19____, with recorder's entry No. ____, ____ County), Utah, which notice of default refers to the trust deed executed by ____ as trustor, in which ____ is named as beneficiary and ____ as trustee, and filed for record ____, 19____, and recorded in Book ____, Page ____, Records of ____ County, (or filed of record ____, 19____, with recorder's entry No. ____, ____ County), Utah.

(legal description)

Signature of Trustee _____

1985

57-1-32. Sale of trust property by trustee — Action to recover balance due upon obligation for which trust deed was given as security.

At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred in bringing an action under this section.

1985

57-1-33. Satisfaction of obligation secured by trust deed — Reconveyance of trust property.

When the obligation secured by any trust deed has been satisfied, the trustee shall, upon written request by the beneficiary, reconvey the trust property. The reconveyance may designate the grantee therein as "the person or persons entitled thereto." The beneficiary under such trust deed shall deliver to the trustor or his successor in interest the trust deed and the note or other evidence of the obligation so satisfied. Any beneficiary under such trust deed who refuses to request a reconveyance from the trustee for a period of thirty days after written demand therefor is made by the trustor or his successor in interest shall be liable to the trustor or his successor in interest, as the case may be, for double damages resulting from such refusal, or such trustor or his successor in interest may bring an action against the beneficiary and trustee to compel a reconveyance of the trust property and in such action the judgment of the court shall be that the trustee reconvey the trust property and that the beneficiary pay to the trustor, or his successor in interest, as the case may be, the costs of suit including a reasonable attorney's fee and all damages resulting from the refusal of the beneficiary to request a reconveyance as hereinabove provided.

1961

57-1-34. Sale of trust property by trustee — Foreclosure of trust deed — Limitation of actions.

The trustee's sale of property under a trust deed shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period

Rule 55. Default.

(a) **Default.**

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(Amended effective Sept. 4, 1985.)

Rule 56. Summary judgment. S4 (4)

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953,

Rule 58

shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985, Jan. 1, 1987.)

Rule 58B. Satisfaction of judgment.

(a) **Satisfaction by owner or attorney.** A judgment may be satisfied, in whole or in part, as to any or all of the judgment debtors, by the owner thereof, or by the attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the following manner: (1) by written instrument, duly acknowledged by such owner or attorney, or (2) by acknowledgment of such satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where first docketed, with the date affixed and witnessed by the clerk. Every satisfaction of a part of the judgment, or as to one or more of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them.

(b) **Satisfaction by order of court.** When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) **Entry by clerk.** Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) **Effect of satisfaction.** When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court, and such entry shall have the same effect as in the county where the same was originally entered.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury, and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Stay of proceedings to enforce a judgment.

(a) **Stay upon entry of judgment.** Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) **Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) **Injunction pending appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) **Stay upon appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) **Stay in favor of the state, or agency thereof.** When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) **Stay in quo warranto proceedings.** Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g) **Power of appellate court not limited.** The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction, writ

11 USCS § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)) [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title [11 USCS §§ 101 et seq.], or to recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS §§ 101 et seq.];

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title [11 USCS §§ 101 et seq.];

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title [11 USCS §§ 101 et seq.];

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS §§ 101 et seq.];

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title [11 USCS § 101 et seq.] against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)) [15 USCS § 78eee(a)(3)], does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title [11 USCS § 546(b)] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title [11 USCS § 547(e)(2)(A)];

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title [11 USCS § 761(4)], forward contracts, or securities contracts, as defined in section 741(7) of this title [11 USCS § 741(7)], that constitutes the setoff of a claim against the debtor for a

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [11 USCS §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq. or 1301 et seq.], the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2570; July 27, 1982, P. L. 97-222, § 3, 96 Stat. 235; July 10, 1984, P. L. 98-353, Title III, Subtitle A, § 304, Subtitle C, § 363(b), Subtitle F, § 392, Subtitle H, § 441, 98 Stat. 352, 363, 365, 371; Oct. 21, 1986, P. L. 99-509, Title V, Subtitle A, § 5001, 100 Stat. 1911; Oct. 27, 1986, P.L. 99-554, Title II, Subtitles B, C, §§ 257(j), 283(d) 100 Stat. 3115, 3116.)

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

11 USCS § 1301. Stay of action against codebtor

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter [11 USCS §§ 1301 et seq.], a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title [11 USCS §§ 701 et seq. or 1101 et seq.].

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2645; July 10, 1984, P. L. 98-353, Title III, Subtitle A, § 313, Subtitle H, § 524, 98 Stat. 355, 388.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Section 402(a) of Act Nov. 6, 1978, provided that this section "shall take effect on October 1, 1979.".

Amendments:

1984. Act July 10, 1984, in subsec. (c)(4), inserted "continuation of"; and added subsec. (d).

UTAH RULES OF APPELLATE PROCEDURE

TITLE I. APPLICABILITY OF RULES.

Rule 1. Scope of rules.

(a) **Applicability of rules.** These rules govern the procedure before the Supreme Court and the Court of Appeals of Utah in all cases. Applicability of these rules to the review of decisions or orders of administrative agencies is governed by Rule 18. When these rules provide for a motion or application to be made in a district, juvenile, or circuit court or an administrative agency, commission, or board, the procedure for making such motion or application shall be governed by the Utah Rules of Civil Procedure, Utah Rules of Criminal Procedure, and the rules of practice of the trial court, administrative agency, commission, or board.

(b) **Reference to "court."** Except as provided in Rule 43, when these rules refer to a decision or action by the court, the reference shall include a panel of the court. The term "trial court" means the court or tribunal from which the appeal is taken. The term "appellate court" means the court to which the appeal is taken.

(c) **Procedure established by statute.** If a procedure is provided by state statute as to the appeal or review of an order of an administrative agency, commission, board, or officer of the state which is inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall apply to such appeals or reviews.

(d) **Rules not to affect jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court or Court of Appeals as established by law.

(e) **Title.** These rules shall be known as the Utah Rules of Appellate Procedure and abbreviated Utah R. App. P.

Rule 2. Suspension of rules.

In the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, except as to the provisions of Rules 4(a), 4(b), 4(e), 5(a), and 48, suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS.

Rule 3. Appeal as of right: how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district, juve-

nile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 5. Discretionary appeals from interlocutory orders.

(a) **Petition for permission to appeal.** An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action.

(b) **Fees and copies of petition.** The petitioner shall file with the Clerk of the Supreme Court an original and seven copies of the petition, or, with the Clerk of the Court of Appeals, an original and four copies, together with the fee for filing a notice of ap-